

**UNITED STATES DISTRICT COURT** Jan 10, 2019  
**EASTERN DISTRICT OF WASHINGTON** SEAN F. MCAVOY, CLERK

JUSTIN S.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:17-cv-03185-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 15, 16

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's Motion, ECF No. 15, and grants Defendant's Motion, ECF No. 16.

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

## STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

1 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless  
2 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."  
3 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's  
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

### 6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within  
8 the meaning of the Social Security Act. First, the claimant must be "unable to  
9 engage in any substantial gainful activity by reason of any medically determinable  
10 physical or mental impairment which can be expected to result in death or which  
11 has lasted or can be expected to last for a continuous period of not less than twelve  
12 months." 42 U.S.C. § 423(d)(1)(A). Second, the claimant's impairment must be  
13 "of such severity that he is not only unable to do his previous work[,] but cannot,  
14 considering his age, education, and work experience, engage in any other kind of  
15 substantial gainful work which exists in the national economy." 42 U.S.C. §  
16 423(d)(2)(A).

17 The Commissioner has established a five-step sequential analysis to  
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
19 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's  
20 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in

1 “substantial gainful activity,” the Commissioner must find that the claimant is not  
2 disabled. 20 C.F.R. § 404.1520(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis  
4 proceeds to step two. At this step, the Commissioner considers the severity of the  
5 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers  
6 from “any impairment or combination of impairments which significantly limits  
7 [his or her] physical or mental ability to do basic work activities,” the analysis  
8 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment  
9 does not satisfy this severity threshold, however, the Commissioner must find that  
10 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

11 At step three, the Commissioner compares the claimant’s impairment to  
12 severe impairments recognized by the Commissioner to be so severe as to preclude  
13 a person from engaging in substantial gainful activity. 20 C.F.R. §  
14 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the  
15 enumerated impairments, the Commissioner must find the claimant disabled and  
16 award benefits. 20 C.F.R. § 404.1520(d).

17 If the severity of the claimant’s impairment does not meet or exceed the  
18 severity of the enumerated impairments, the Commissioner must pause to assess  
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),  
20 defined generally as the claimant’s ability to perform physical and mental work

activities on a sustained basis despite his or her limitations, 20 C.F.R. § 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is

1 capable of performing other work; and (2) such work “exists in significant  
2 numbers in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*,  
3 700 F.3d 386, 389 (9th Cir. 2012).

#### 4 **CHILDHOOD DISABILITY INSURANCE BENEFITS**

5 Title II of the Social Security Act provides disabled child’s insurance  
6 benefits based on the earnings record of an insured person who is entitled to old-  
7 age or disability benefits or has died. 42 U.S.C. § 402(d); 20 C.F.R. § 404.350(a).  
8 The same definition of “disability” and five-step sequential evaluation outlined  
9 above governs eligibility for disabled child’s insurance benefits. *See* 42 U.S.C. §  
10 423(d); 20 C.F.R. § 404.1520(a)(1)-(2). In addition, in order to qualify for  
11 disabled child’s insurance benefits several criteria must be met. 20 C.F.R. §§  
12 404.350(a)(1)-(5). As relevant here, if the claimant is over 18, the claimant must  
13 “have a disability that began before he became 22 years old.” 20 C.F.R. §  
14 404.350(a)(5).

#### 15 **ALJ’S FINDINGS**

16 On September 19, 2011, at age 27, Plaintiff applied for child disability  
17 insurance benefits (CDB claim), alleging a date of disability onset beginning on  
18 July 16, 1990, at age five. Tr. 215-18. Plaintiff’s application was denied initially  
19  
20

1 and upon reconsideration. Tr. 93-99.<sup>1</sup> Plaintiff appeared before an administrative  
2 law judge (ALJ) on May 1, 2013. Tr. 36-76. At the hearing, Plaintiff amended his  
3 alleged onset date to July 19, 2002, at age 18. Tr. 42. On June 24, 2013, the ALJ  
4 denied Plaintiff's claim. Tr. 16-35. On December 30, 2014, the Appeals Council  
5 denied Plaintiff's request for review. Tr. 1-6. Plaintiff filed a timely appeal in this  
6 Court. *Sturm v. Colvin*, No. 1:15-cv-03034-MKD (E.D. Wash. Feb. 14, 2015)  
7 (Complaint, ECF No. 4).

8 While the appeal on the CDB claim was pending, on February 2, 2016,  
9 Plaintiff filed a new Title II DIB application (DIB II), Tr. 916, and a new Title XVI  
10 SSI application (SSI II), Tr. 902. In those applications, Plaintiff alleged on onset  
11 date of January 2016, which is ten years after the relevant period in the CDB claim.  
12 Tr. 902.

13 On February 17, 2016, this Court reversed the decision on the CDB claim  
14 and remanded the proceedings for further review of Plaintiff's claim and  
15

---

16 <sup>1</sup> The administrative transcript also includes denials of Plaintiff's simultaneously  
17 filed Title II disability insurance (DIB I) and Title XVI supplemental security  
18 income benefits applications (SSI I), which were simultaneously filed with  
19 Plaintiff's child disability insurance (CDB) claim. Tr. 198-201; 202-09. These  
20 applications are not at issue in this appeal.

1 consideration of the evidence of Plaintiff's foot impairment and lay witness  
2 testimony. Tr. 875-900.

3 On March 15, 2016, the Appeals Council vacated the decision on the CDB  
4 claim and remanded for further review. Tr. 914-17. The Appeals Council also  
5 issued this directive:

6 The claimant filed an electronic subsequent claim for Title II disability  
7 benefits on February 2, 2016. The Appeals Council's action with respect to  
8 the current electronic claims renders the subsequent claim duplicate.  
9 Therefore, the Administrative Law Judge will consolidate the claim files,  
10 create a single electronic record and issue a new decision on the  
11 consolidated claims (20 CFR 404.952 and 416.1452, HALLEX I-1-10-10).

12 Tr. 916.

13 Another administrative hearing was held on February 14, 2017. Tr. 802-37.  
14 During the hearing Plaintiff amended his alleged date of onset to July 11, 2006,  
15 just prior to his 22nd birthday, Tr. 804, although the ALJ relied upon the date of  
16 July 1, 2006. Tr. 776.

17 On August 21, 2017, the ALJ again issued an order regarding Plaintiff's  
18 CDB claim, which again denied the claim. Tr. 772-801. Initially, the ALJ's  
19 decision discussed the two subsequent adult disability applications (DIB II and SSI  
20 II). First, the ALJ dismissed Plaintiff's DIB II claim filed February 2, 2016, noting  
Plaintiff had not acquired sufficient quarters of coverage to be insured. Tr. 794.  
Second, the ALJ noted that he would not consider the SSI II claim because:



1 The [Appeals Council's] remand order from March 15, 2016 did not  
2 mention the Title XVI application or otherwise direct me to consider this  
3 application . . . I therefore do not have jurisdiction over this application.  
4 The claimant did not seek reconsideration of his Title XVI application,  
5 making the initial determination the administratively final determination of  
6 this application.

7 Tr. 776.

8 With respect to the merits of the CDB claim, the ALJ found that Plaintiff  
9 had not attained the age of 22 as of July 1, 2006. Tr. 778. At step one, the ALJ  
10 found Plaintiff has not engaged in substantial gainful activity since July 1, 2006.  
11 Tr. 778. At step two, the ALJ found Plaintiff had the following severe  
12 impairments prior to attaining the age of 22: organic mental disorder (learning  
13 disorder and/or attention deficit disorder), autistic disorder, foot impairment, and  
14 obesity. Tr. 778. At step three, the ALJ found that Plaintiff did not have an  
15 impairment or combination of impairments that met or medically equaled the  
16 severity of a listed impairment. Tr. 778. The ALJ then concluded that prior to  
17 attaining age 22, Plaintiff had the RFC to:

18 lift and carry ten pounds frequently and twenty pounds occasionally. He  
19 could stand and/or walk for fifteen-minute intervals, for two to four hours  
20 per eight-hour workday. He had no sitting restrictions. He could not climb  
ladders, rope, or scaffolding. He could occasionally kneel, crawl, and climb  
ramps and stairs. He could not work at unprotected heights or operate heavy  
equipment. He could remember, understand, and carry out instructions for  
tasks generally required by occupations with a specific vocational  
preparation (SVP) of two or less. He could read and understand written  
instructions associated with such tasks. He could occasionally write as part  
of his work duties. He could have occasional superficial face-to-face  
interaction with the general public. He had no restrictions with public

1 interaction over the phone or internet. He could work in proximity to small  
2 groups of people, of less than twenty-five people. He could occasionally  
3 interact with coworkers and supervisors. He could adjust to work setting  
4 changes generally associated with occupations with a SVP of two or less.  
He could interact on a frequent basis with supervisors for a short period  
during job training, up to thirty days. He could not drive as part of his job  
duties.

5 Tr. 781-82.

6 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 792. At  
7 step five, the ALJ found that considering Plaintiff's age, education, work  
8 experience, and RFC, there were jobs that exist in significant numbers in the  
9 national economy that the Plaintiff could perform such as document preparer, toy  
10 stuffer, and telephone information clerk. Tr. 793. The ALJ also noted that in May  
11 2013, the vocational expert had identified other sedentary jobs that could be  
12 performed by an individual with Plaintiff's mental limitations, including assembler  
13 and semiconductor bonder. Tr. 793. The ALJ concluded Plaintiff has not been  
14 under a disability, as defined in the Social Security Act, any time prior to the date  
15 Plaintiff attained age 22. Tr. 793.

1 It does not appear Plaintiff filed any written exceptions with the Appeals  
2 Council<sup>2</sup> and the Appeals Council did not assume jurisdiction on its own authority,  
3 thus the ALJ's 2017 ruling became the final decision of the Commissioner as that  
4 term is defined by 42 U.S.C. § 405(g). 20 C.F.R. § 404.984.

### 5 ISSUES

6 Plaintiff seeks judicial review of the Commissioner's final decision denying  
7 him child disability insurance benefits under Title II and declining jurisdiction over  
8 his application for supplemental security income benefits under Title XVI of the  
9 Social Security Act. ECF No. 15. Plaintiff raises the following issues for this  
10 Court's review:

- 11 1. Whether the ALJ properly followed the Appeals Council's remand order;
- 12 2. Whether the ALJ properly weighed the opinion of Plaintiff's podiatrist;
- 13 and
- 14 3. Whether the ALJ properly weighed Plaintiff's symptom claims.

---

15  
16  
17  
18 <sup>2</sup> The ALJ's Notice of Decision advised Plaintiff that he was not required to file  
19 any written exceptions with the Appeals Council before filing an appeal in this  
20 Court. Tr. 773.

1 See ECF No. 15 at 8-20.

## 2 DISCUSSION

### 3 A. SSI Application

4 Plaintiff contends the ALJ erred by failing to consolidate Plaintiff's Title  
5 XVI SSI claim (SSI II) with his Title II CDB and DIB II claims. ECF No. 15 at 8-  
6 13.

#### 7 1. Background Regarding Title II and Title XVI Claims

8 The Appeals Council's March 15, 2016 Order remanding Plaintiff's Title II  
9 CDB claim noted that "[t]he [Plaintiff] filed an electronic subsequent claim for  
10 Title II disability benefits on February 2, 2016. The Appeals Council's action with  
11 respect to the current electronic claims renders the subsequent claim duplicate."  
12 Tr. 916. The Order then directed: "Therefore, the Administrative Law Judge will  
13 consolidate the claim files, create a single electronic record and issue a new  
14 decision on the consolidated claims (20 CFR 404.952 and 416.1452, HALLEX I-1-  
15 10-10)." Tr. 916. The ALJ concluded that the Appeal Council's directive did not  
16 pertain to Plaintiff's subsequently filed Title XVI SSI (SSI II) claim and he did not  
17 consider it. Tr. 776.

18 Plaintiff disputes the ALJ's interpretation of the Remand Order. Although  
19 the Remand Order referenced only Plaintiff's Title II disability benefits (DIB II)  
20 claim filed February 2, 2016, Plaintiff claims the Remand order can "only be read"

as to direct consolidation of all of Plaintiff's Title II (CDB and DIB II) and Title XVI SSI (SSI II) claims because the stock language the Order utilized cited to both the Title II and the Title XVI regulations, 20 C.F.R. § 404.952 and § 416.1452. ECF No. 15 at 10. Plaintiff asserts he presumed consolidation of the SSI II claim was ordered and as a result he did not timely appeal the denial of the SSI II claim. ECF No. 15 at 10. Plaintiff asks the Court to rectify this error by remanding for additional consolidated proceedings considering the SSI II claim. ECF No. 15 at 20. Defendant contends the ALJ did not error and this Court lacks jurisdiction to review the discretionary act of not consolidating the SSI claim. ECF No. 16 at 10.

## *2. Court's Scope of Review*

The Social Security Act "clearly limits judicial review to a particular type of agency action," *Califano v. Sanders*, 430 U.S. 99, 109 (1977), "any final decision of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). In *Mathews v. Eldridge*, the Supreme Court held that the "final decision of the [Commissioner] made after a hearing" consists of two elements: (1) presentment of the claim for benefits to the Commissioner; and (2) complete exhaustion of administrative remedies. *Mathews*, 424 U.S. 319, 328–30 (1976). Under Ninth Circuit law, " '[f]inal decision,' read in the context of the elaborate scheme for administrative determination of disability claims which precedes it, plainly refers to a decision on the merits." *Peterson v. Califano*, 631 F.2d 628, 630 (9th Cir.

1 1980); *Matlock v. Sullivan*, 908 F.2d. 492, 494 (9th Cir. 1990). The exception to §  
2 405(g) are constitutional questions, which are unsuited to resolution in  
3 administrative hearing procedures. *Califano*, 430 U.S. at 109.

4 In the present proceedings, the ALJ's alleged failure to follow the Remand  
5 Order is not a proper basis for a reversal or remand. Plaintiff's Title XVI (SSI II)  
6 claim was denied on the merits at the initial level on March 7, 2016 in a separate  
7 determination without a hearing. Tr. 969-82. The only "final decisions" in this  
8 matter pertain to Plaintiff's Title II claims, and as the Ninth Circuit instructs, "[t]he  
9 ALJ's errors are relevant only as they affect that analysis on the merits." *See*  
10 *Strauss v. Comm'r of Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011);  
11 *Wentzek v. Colvin*, 2013 WL 4742993, at \*4 (D. Or. Sept. 3, 2013) (explaining that  
12 where an ALJ fails to comply with a remand order, reversal is only warranted to  
13 the extent that the reviewing court found harmful error regarding issues  
14 challenging disability determination on the merits). Moreover, Plaintiff has not  
15 presented this Court with any allegation of a constitutional violation. Whether the  
16 ALJ complied with the Appeals Council's Remand Order is non-reviewable in this  
17 instance as the alleged error, the failure to consolidate, does not relate to the  
18 Court's review of the ALJ's "final decision" on the merits of his Title II claims.  
19 This conclusion is wholly consistent with the cases cited by Plaintiff which  
20 involved reviewable errors, ECF No. 17 at 4, regarding the ALJ's failure to comply

1 with remand instructions related to the substantive merit of the disability claim.  
2 ECF No. 17 at 4 (citing *Jackson v. Berryhill*, 2018 WL 1466423 (W.D. Wash.  
3 March 26, 2018) (failure to reconcile doctor’s opinion as directed); *Scott v.*  
4 *Barnhart*, 592 F.Supp.2d 360 (W.D.N.Y. 2009) (failure to follow remand  
5 instructions pertaining to the RFC and hypothetical); *Salvati v. Astrue*, 2010 WL  
6 546490 (E.D. Tenn. Feb. 10, 2010) (failure to follow order to evaluate mental  
7 impairment with a special technique)).

8       3. *The ALJ properly interpreted the Appeals Council’s Remand Order*

9       In the alternative, the Court finds that the ALJ property interpreted the  
10 Appeal Council’s Remand Order as consolidating only the Title II DIB claims.

11       Plaintiff contends that the intent of the Appeals Council’s order was to  
12 eliminate duplicate claims for administrative efficiency and the failure to  
13 consolidate the SSI II claim “makes no logical sense.” ECF No. 17 at 5. However,  
14 the Remand Order only explicitly mentions the “Title II disability benefits [claim  
15 filed] on Feb. 2, 2016,” not the SSI II claim. Tr. 916. The Social Security’s  
16 hearing, appeals, and litigation manual (HALLEX) directs the following regarding  
17 applications that are not rendered duplicate: “[i]f the subsequent application  
18 involves an overlapping period of time with the prior claim, the AC may direct the  
19 ALJ consolidate the claims and adjudicate them together on remand.” HALLEX I-  
20 1-10-35. Here, the relevant focus of the CDB claim was the period beginning prior

1 to Plaintiff's 22nd birthday (July 2006), whereas the SSI II claim pertained to the  
2 period beginning nearly ten years later on January 1, 2016. Given the explicit  
3 direction in the Remand Order, followed by what appears to be a frequently used  
4 boilerplate list of citations, the ALJ's interpretation of the Remand Order was  
5 reasonable.

6 The Court further notes that approximately 17 months after the Remand  
7 Order, Plaintiff was sent a Notice of Hearing confirming that the purpose of the  
8 hearing on February 14, 2017 would be to consider the remanded Title II claim.  
9 Tr. 1002. The Notice instructed Plaintiff that if there was disagreement with the  
10 issues, he should notify the ALJ in writing "as soon as possible." Tr. 1003. It does  
11 not appear that Plaintiff objected to the Notice of Hearing. At the hearing, there  
12 was no specific mention of the Remand Order, consolidation, or Plaintiff's Title  
13 XVI (SSI II) application.<sup>3</sup> Plaintiff did not seek review or file exceptions with the  
14 Appeals Council regarding this issue. Plaintiff's request that this Court reject the  
15 ALJ's interpretation of the Remand Order, in effect, calls for review of the Appeals  
16 Council's non-final decision and conflicts with the rationale and purpose of

17 \_\_\_\_\_  
18 <sup>3</sup> At the outset of the hearing, Plaintiff's counsel stated that "just for procedural  
19 ease" he would amend the alleged onset date to July 11, 2006 noting "[t]hat  
20 preserves his Child Disability Benefits time period." Tr. 804.



1 administrative exhaustion which is to give the agency the opportunity to correct its  
2 own errors.

### 3 **B. Medical Opinion Evidence**

4 Plaintiff contends the ALJ improperly weighed the medical opinion of  
5 Plaintiff's treating podiatrist, Stuart B. Cardon, DPM. ECF No. 15 at 13-17.

6 There are three types of physicians: "(1) those who treat the claimant  
7 (treating physicians); (2) those who examine but do not treat the claimant  
8 (examining physicians); and (3) those who neither examine nor treat the claimant  
9 but who review the claimant's file (nonexamining or reviewing physicians)."

10 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).

11 "Generally, a treating physician's opinion carries more weight than an examining  
12 physician's, and an examining physician's opinion carries more weight than a  
13 reviewing physician's." *Id.* "In addition, the regulations give more weight to  
14 opinions that are explained than to those that are not, and to the opinions of  
15 specialists concerning matters relating to their specialty over that of  
16 nonspecialists." *Id.* (citations omitted).

17 If a treating or examining physician's opinion is uncontradicted, an ALJ may  
18 reject it only by offering "clear and convincing reasons that are supported by  
19 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

20 "However, the ALJ need not accept the opinion of any physician, including a

1 treating physician, if that opinion is brief, conclusory and inadequately supported  
2 by clinical findings.” *Bray v. Comm’r Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th  
3 Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or  
4 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ  
5 may only reject it by providing specific and legitimate reasons that are supported  
6 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-  
7 31).

8 Dr. Cardon provided a number of opinions regarding the functional impact  
9 of Plaintiff’s foot impairment:

10 (1) *March 2012*: Plaintiff cannot stand or walk more than 30 minutes at a  
11 time. Tr. 1213 (progress note).

12 (2) *May 2012*: Plaintiff has to lie down during the day; Plaintiff’s  
13 condition will deteriorate if standing or walking for “long periods of time,” greater  
14 than two hours a day; Plaintiff would miss on average four days a month if  
15 standing “gets too much to be able to do so”; Plaintiff’s limitations have existed  
16 since July 11, 2006. Tr. 758-59 (Medical Report).

17 (3) *April 2016*: Plaintiff does not need to lie down; Plaintiff’s condition  
18 would deteriorate if work included standing greater than two hours a day, more  
19 than 30 minutes at a time; Plaintiff would miss on average three days per month  
20

1 depending on the amount of standing or walking that was required; Plaintiff's  
2 limitations have existed since November 18, 2014. Tr. 1144-45 (Medical Report).

3 (4) *Jan. 2017*: Plaintiff's condition has since at least July 11, 2006 met  
4 the definition of "major dysfunction of a joint," resulting in an inability to  
5 ambulate effectively to carry out activities of daily living. Tr. 1751-52 (Medical  
6 Report).

7 The ALJ considered, and partially credited, Dr. Cardon's opinions. Tr. 788-  
8 89. Specifically, the ALJ determined that the combination of Plaintiff's obesity  
9 and Dr. Cardon's 2012 diagnosis of a progressive condition of the foot justified  
10 finding Plaintiff had a severe impairment of the foot as of July 2006. Tr. 788. The  
11 ALJ also gave Dr. Cardon's 2012 and 2016 assessments "some weight" and  
12 "giving him the benefit of the doubt," found that as of July 2006, the combination  
13 of Plaintiff's obesity and foot impairment limited him to standing and/or walking  
14 for fifteen-minute intervals. Tr. 788. However, the ALJ rejected Dr. Cardon's  
15 opinions that Plaintiff could not have stood or walked in excess of two hours total  
16 in an eight-hour day, would have had attendance problems, and had an impairment  
17 at listing-level severity as of July 2006. Tr. 788-89.

18 Plaintiff contends these opinions were uncontradicted. ECF No. 15 at 14.  
19 However, in February 2012, state agency physician Robert Hoskins, M.D., opined  
20 that Plaintiff had no medically determinable physical impairment as of 2006. Tr.

89-90 (Feb. 22, 2012). The ALJ gave some weight to this assessment. Tr. 788. Therefore, the ALJ needed to identify specific and legitimate reasons to discredit Dr. Cardon's opinions. *Bayliss*, 427 F.3d at 1216. However, the reasons set forth by the ALJ also meet the higher clear and convincing standard relied upon by Plaintiff.

The ALJ provided several reasons for discounting Dr. Cardon's opinions. Tr. 788-89. First, the ALJ found Dr. Cardon's "basis for opinions of [Plaintiff's] functioning prior to September 2010 is undetermined, as he has no documented review of evidence prior to 2010." Tr. 789. Plaintiff does not challenge this significant finding; thus, any challenge is waived. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (determining Court may decline to address on the merits issues not argued with specificity). The length of the treatment relationship is relevant to how much weight a doctor's opinion should be accorded. 20 C.F.R. § 404.1527(c). Although retrospective assessments should not be disregarded solely because they are rendered retrospectively, in *Magallanes v. Bowen*, 881 F.2d 747, 754 (9th Cir. 1989), the Ninth Circuit found that when a treating physician opines about a claimant's condition prior to the date that the treating physician had direct personal knowledge of the condition, the treating physician is "scarcely different from any non-treating physician with respect to that time period." 881 F.2d 747, 754 (9th Cir. 1989) (ALJ properly

1 discounted doctor's retrospective opinion about a disability onset date in light of  
2 the fact that the doctor did not see the claimant until two years later and there was  
3 no other objective medical evidence of disability during the time alleged); *Johnson*  
4 *v. Shalala*, 60 F.3d 1428, 1432-1433 (9th Cir. 1995) (concluding that because a  
5 physician's retrospective assessment included no specific assessment of claimant's  
6 functional capacity prior to that date, the ALJ's rejection of his testimony was  
7 reasonable); *see also Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th  
8 Cir. 1984) (ALJ properly ignored opinion of psychiatrist who examined Plaintiff  
9 because "[a]fter-the-fact psychiatric diagnoses are notoriously unreliable.").

10 In this case, the ALJ found Dr. Cardon started treating Plaintiff in September  
11 2010, assisting Plaintiff with orthotics he had reportedly been using for three years.  
12 Tr. 788-89. After a follow-up that October, Plaintiff did not return to Dr. Carden  
13 until March 2012, when Dr. Cardon diagnosed progressive foot arthritis. Tr. 784,  
14 1213. Dr. Cardon provided opinions based on a diagnosis made six years *after* the  
15 period at issue, and because there was no medical evidence from that period to  
16 corroborate Dr. Cardon's opinions and inconsistent evidence from after the period  
17 (noted below), the ALJ reasonably could accord Dr. Cardon's retrospective  
18 opinions less weight.

19 In partially rejecting Dr. Cardon's opinions, the ALJ also relied upon  
20 medical evidence showing relatively little physical impairment with minimal and

1 conservative treatment. Tr. 784-85. An ALJ may reject a treating physician's  
2 opinion if the physician prescribed a conservative course of treatment. *See Rollins*  
3 *v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). Here, the ALJ met his burden by  
4 giving a detailed review of Plaintiff's treatment history, which included, "no  
5 documented complaints of a foot impairment until September 2010," no reference  
6 to foot complaints in his primary medical care in 2011, 2013 and 2014, no  
7 reference to foot issues in a comprehensive physical evaluation in 2015, no  
8 findings of impaired gait, and no documented treatment after April 2016. Tr. 784-  
9 85. In addition, substantial evidence supports the ALJ's finding that Plaintiff's  
10 foot impairment was managed with orthotics and corrective shoes, and without  
11 pain medication. Tr. 785. Plaintiff does not contest these findings, noting only  
12 that he was regularly seen by Dr. Cardon and that surgery "is not an option . . . at  
13 the current time." ECF No. 15 at 16. Regarding the relevant period as of July  
14 2006, Plaintiff's limited and conservative treatment of his feet supports the ALJ's  
15 rejection of Dr. Cardon's opinions pertaining to this period.

16       Next, the ALJ found Plaintiff's activities inconsistent with Dr. Cardon's  
17 opinions. Tr. 788. An ALJ may discount an opinion that is inconsistent with a  
18 claimant's reported functioning. *See Morgan v. Comm'r of Soc. Sec. Admin.*, 169  
19 F.3d 595, 601-02 (9th Cir. 1999). However, the record must contain specific  
20 details about the nature, frequency, and/or duration of the activities for them to

1 “constitute ‘substantial evidence’ inconsistent with a [treating physician’s]  
2 informed opinion.” *Trevizo v. Berryhill*, 871 F.3d 664, 676-77 (9th Cir. 2017). In  
3 reaching this conclusion, the ALJ’s decision described specific activities and  
4 statements in the record regarding Plaintiff’s ability to stand and walk,  
5 contemporaneous to Dr. Cardon’s treatment of Plaintiff. In September 2010,  
6 Plaintiff had reported to Dr. Cardon that he could he could walk for a “couple of  
7 miles.” Tr. 789 (citing 1213 (progress note discussing orthotics stating “[h]e tries  
8 to wear them when he is exercising and can only wear them for [sic] couple of  
9 miles.”)). In October 2011, Plaintiff wrote, “I can only be on my feet for a couple  
10 hours,” though they would begin hurting sometimes after 20 minutes or less. Tr.  
11 786 (citing Tr. 262); *see* Tr. 264 (“I can be on them for about 2 hours at most...”).  
12 At the hearing in 2017, the ALJ also developed the record regarding the extent and  
13 the frequency of increased activity level and Plaintiff testified that for two years he  
14 usually walked in the evening for 30-45 minutes. Tr. 809. The ALJ also noted that  
15 Plaintiff had reported mowing the lawn and enjoying fishing. Tr. 786; *see* Tr. 55,  
16 259, 749 (Feb. 2011 progress note listing main hobbies as computer games and  
17 fishing); 1128. The Court rejects Plaintiff’s contention the decision lacks adequate  
18 specificity. ECF No. 17 at 7; *Magallanes*, 881 F.2d at 755 (“As a reviewing court,  
19 we are not deprived of our faculties for drawing specific and legitimate inferences  
20 from the ALJ’s opinion.”). The ALJ reasonably concluded Dr. Cardon’s

1 retrospective assessment of Plaintiff's ability to stand or walk in an eight-hour day  
2 was inconsistent with the substantial evidence of Plaintiff's activities.

3       The ALJ listed additional reasons for specifically rejecting Dr. Cardon's  
4 January 2017 opinion that as of July 2006 Plaintiff met the definition of "major  
5 dysfunction of a joint" "resulting in inability to ambulate effectively" "to carry out  
6 activities of daily living." Tr. 1751. First, the ALJ noted that the assessment was  
7 inconsistent with Dr. Cardon's prior assessments, none of which included a finding  
8 that Plaintiff could not ambulate effectively. Tr. 789. Incongruity between a  
9 doctor's medical opinion and treatment records or notes is a specific and legitimate  
10 reason to discount a doctor's opinion. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041  
11 (9th Cir. 2008). Moreover, the ALJ may properly reject a medical opinion that  
12 gives no explanation for deviating from the provider's prior medical opinion. *See*  
13 *Morgan*, 945 F.2d at 1081. The ALJ noted that Dr. Cardon's 2017 opinion was  
14 "without any explanation or support"; where prompted on the yes/no "check box  
15 assessment" to provide an explanation, Dr. Cardon left the form blank. Tr. 789.

16       Next, citing the disparity between Dr. Cardon's unexplained opinion and  
17 "the available evidence," the ALJ concluded Dr. Cardon "heavily relied" upon the  
18 Plaintiff's own reports of pain symptoms, which he found were not reliable. Tr.  
19 789. A physician's opinion may be rejected if it based on a claimant's subjective  
20 complaints which were properly discounted. *Tonapetyan v. Halter*, 242 F.3d 1144,



1 1149 (9th Cir. 2001); *Morgan*, 169 F.3d at 602; *Fair v. Bowen*, 885 F.2d 597, 604  
2 (9th Cir. 1989). The lack of treatment or medical evidence from the 2006  
3 timeframe Dr. Cardon opined on supports to the ALJ's conclusion that Dr. Cardon  
4 heavily relied upon Plaintiff's self-report.

5 Finally, Plaintiff argues generally that the ALJ erred in discrediting Dr.  
6 Cardon's opinion by failing to apply the appropriate factors to the evaluation of a  
7 treating provider's opinion. ECF No. 15 at 17 (citing *Trevizo*, 871 F.3d at 676).  
8 Unlike *Trevizo*, here the ALJ noted that Dr. Cardon was a treating provider,  
9 exhaustively reviewed Dr. Cardon's treatment notes throughout the decision,  
10 identified substantial evidence that was inconsistent with Dr. Cardon's opinion,  
11 and made findings based on the ALJ's summary of the facts and evidence.  
12 *Compare* Tr. 784-90 with *Trevizo*, 871 F.3d at 675-77.

13 In sum, although retrospective medical opinions are relevant, the ALJ gave  
14 clear and convincing reasons for rejecting Dr. Cardon's 2017 assessment of a  
15 disabling impairment as of 2006, and partially rejecting his 2012 and 2016  
16 assessments regarding absences and the standing/walking limitation. The ALJ did  
17 not err in rejecting Dr. Cardon's opinions.

### 18 **C. Plaintiff's Symptom Claims**

19 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
20 convincing in discrediting his symptom claims. ECF No. 15 at 17-20.

1 An ALJ engages in a two-step analysis to determine whether to discount a  
2 claimant's testimony regarding subjective symptoms. SSR 16-3p, 2016 WL  
3 1119029, at \*2. "First, the ALJ must determine whether there is objective medical  
4 evidence of an underlying impairment which could reasonably be expected to  
5 produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation  
6 marks omitted). "The claimant is not required to show that [his] impairment could  
7 reasonably be expected to cause the severity of the symptom [he] has alleged; [he]  
8 need only show that it could reasonably have caused some degree of the  
9 symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

10 Second, "[i]f the claimant meets the first test and there is no evidence of  
11 malingering, the ALJ can only reject the claimant's testimony about the severity of  
12 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
13 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
14 omitted). General findings are insufficient; rather, the ALJ must identify what  
15 symptom claims are being discounted and what evidence undermines these claims.  
16 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th  
17 Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant's  
18 symptom claims)). "The clear and convincing [evidence] standard is the most  
19 demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995,

1 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,  
2 924 (9th Cir. 2002)).

3 Factors to be considered in evaluating the intensity, persistence, and limiting  
4 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
5 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
6 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
7 side effects of any medication an individual takes or has taken to alleviate pain or  
8 other symptoms; 5) treatment, other than medication, an individual receives or has  
9 received for relief of pain or other symptoms; 6) any measures other than treatment  
10 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
11 factors concerning an individual’s functional limitations and restrictions due to  
12 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §  
13 404.1529(c). The ALJ is instructed to “consider all of the evidence in an  
14 individual’s record,” “to determine how symptoms limit ability to perform work-  
15 related activities.” SSR 16-3p, 2016 WL 1119029, at \*2.

16 Here, the ALJ found Plaintiff’s medically determinable impairments could  
17 reasonably be expected to produce the symptoms alleged, but Plaintiff’s statements  
18 concerning the intensity, persistence and limiting effects of these symptoms were  
19  
20

1 “not entirely consistent with the medical evidence and other evidence in the record  
2 for the reasons explained in this decision.” Tr. 793.

3 *1. Law of the Case*

4 Defendant contends that Plaintiff’s allegation of error relating to Plaintiff’s  
5 mental health symptom testimony should be rejected under the law of the case  
6 doctrine. ECF No. 16 at 18-19. This Court previously concluded that the ALJ’s  
7 2013 decision did not err in assessing Plaintiff’s mental health symptom claims.  
8 Tr. 889-93. The ALJ reiterated this Court’s 2016 findings in his latest decision.  
9 Tr. 783, 786. Plaintiff did not reply to this contention. *See* ECF No. 17.

10 The law of the case doctrine applies in the Social Security context. *Stacy v.*  
11 *Colvin*, 825 F.3d 563, 567 (9th Cir. 2016). Under the law of the case doctrine, a  
12 court is precluded from revisiting issues which have been decided—either  
13 explicitly or implicitly—in a previous decision of the same court or a higher court.  
14 *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). The doctrine of  
15 the law of the case “is concerned primarily with efficiency, and should not be  
16 applied when the evidence on remand is substantially different, when the  
17 controlling law has changed, or when applying the doctrine would be unjust.”  
18 *Stacy*, 825 F.3d at 567.

19 In this Court’s 2016 decision, the Court found that the ALJ had provided  
20 adequate reasons for discounting Plaintiff’s subjective mental health symptom

1 complaints based upon his (1) activities of daily living, (2) lack of motivation to  
2 work, and (3) failure to comply with treatment. Tr. 893. The Court specifically  
3 directed the ALJ to re-evaluate Plaintiff's testimony and symptom claims on  
4 remand "with respect to the alleged foot impairment" and after considering  
5 evidence of Plaintiff's physical impairments. Tr. 894. However, the Court's Order  
6 left open and the ALJ remained free to reinterpret the evidence and take new  
7 evidence. *Id.* The Court notes that as to Plaintiff's mental health symptoms,  
8 Plaintiff does not challenge the ALJ's similar findings regarding activities of daily  
9 living related and lack of motivation, thus Plaintiff has not identified any  
10 compelling reason to review or deviate from the Court's findings on these issues  
11 that were also adjudicated previously. Regardless of the law of the case doctrine's  
12 applicability, as new evidence was received, and new findings were made,  
13 Plaintiff's limited contentions are addressed on the merits below.

14 *2. Improvement with Treatment and Lack of Compliance with Treatment*

15 The ALJ discounted Plaintiff's mental health symptom claims based on  
16 evidence of Plaintiff's lack of compliance with treatment and improvement with  
17 treatment. Tr. 783. This reason was also discussed in the ALJ's 2013 decision and  
18 previously affirmed by this Court. Tr. 892-93. The effectiveness of medication  
19 and treatment is a relevant factor in determining the severity of a claimant's  
20 symptoms. 20 C.F.R. §§ 404.1529(c)(3); *see Warre v. Comm'r of Soc. Sec.*

1 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (conditions effectively controlled  
2 with medication are not disabling for purposes of determining eligibility for  
3 benefits) (internal citations omitted); *see also Tommasetti*, 533 F.3d at 1040 (a  
4 favorable response to treatment can undermine a claimant's complaints of  
5 debilitating pain or other severe limitations).

6 The ALJ explained in detail evidence supporting the conclusion that  
7 Plaintiff's mental issues were "well-controlled and stable" when compliant with  
8 treatment and Plaintiff reported only intermittent compliance with medication. Tr.  
9 783. The ALJ cited to academic testing and other medical evidence record, which  
10 the ALJ found demonstrated Plaintiff was "performing well in school with the use  
11 of psychiatric medication." Tr. 783 (citing Tr. 720, 722, 724, 733, 735, 744).  
12 Plaintiff does not contest this finding, but claims the ALJ failed to consider that  
13 Plaintiff was in an Individualized Education Program (IEP) to assist in Plaintiff's  
14 progress and behavior at school. ECF No. 15 at 18. However, Plaintiff's IEP does  
15 not alter the fact of Plaintiff's poor compliance with psychiatric medications,  
16 missed appointments, and the fact Plaintiff did not report major changes in his  
17 condition despite poor compliance. Tr. 783.

18 Plaintiff next contends that contrary to the ALJ's finding that Plaintiff's  
19 mental symptoms were well controlled, the 2016 opinion of licensed social worker  
20 M. Neil Anderson that Plaintiff would be off task 21-30% of a 40-hour work week

1 demonstrates Plaintiff's mental health symptoms, even with treatment, "had not  
2 improved to the point that he would be employable." ECF No. 15 at 19 (citing Tr.  
3 1147, 1149). Notably, Plaintiff did not challenge the ALJ's detailed rationale for  
4 according minimal weight to Mr. Anderson's statements when determining  
5 Plaintiff's functioning through his 22nd birthday. Tr. 791. The ALJ instead  
6 primarily relied upon treatment records from the time period at issue. Tr. 783.  
7 The ALJ also reviewed the more recently developed record, noting that after  
8 Plaintiff's psychiatric care discontinued in 2004 due to poor compliance, Plaintiff  
9 had no documented mental health complaints until March 2015. Tr. 783 (citing  
10 1098, 1112, 1140). Even once Plaintiff's psychiatric care resumed, it revealed  
11 "generally benign findings." Tr. 784. His treating practitioner concluded that  
12 while Plaintiff would benefit from therapy and improvement in social outlets, she  
13 did not believe Plaintiff would benefit from medication. Tr. 784 (citing Tr. 1107-  
14 08). By May 2016, Plaintiff reported improvement in his mental health goals and  
15 decreased psychotherapy sessions. Tr. 784. As this Court previously found,  
16 Plaintiff's minimal treatment and non-compliance with treatment were specific,  
17 clear and convincing reasons for not fully crediting Plaintiff's allegation of  
18 disabling mental health symptoms.

1           3. *Symptom Claims Re: Foot Impairment*

2           Plaintiff also claims the ALJ improperly partially rejected his complaints of  
3 foot pain. ECF No. 15 at 20. Rather than briefing the same arguments, Plaintiff  
4 incorporated by reference the same argument raised earlier in the brief regarding  
5 Dr. Cardon's opinion evidence. *Id.*

6           In this case, the ALJ exhaustively reviewed the evidence and detailed the  
7 basis and reasons for his rejection of Plaintiff's symptom claims. Tr. 783-88.

8           Although the ALJ in fact partially credited Plaintiff's claims of foot pain, the ALJ  
9 rejected the allegation of disabling symptoms for a number of reasons. First, the  
10 ALJ cited the lack of treatment until September 2010, despite alleging that Plaintiff  
11 had missed class years prior in high school due to foot issues. Tr. 785. An  
12 unexplained, or inadequately explained, failure to seek treatment or follow a  
13 prescribed course of treatment may be considered when evaluating the claimant's  
14 subjective symptoms. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). Here, the  
15 ALJ noted Plaintiff had no documented complaints of foot pain until September  
16 2010 when he visited Dr. Cardon and he did not seek further treatment until March  
17 2012. Tr. 784. Plaintiff's lack of treatment was a clear and convincing reason to  
18 discount Plaintiff's claims of a disabling symptoms associated with his foot  
19 impairment.



1 Second, the ALJ cited adequate control with the use of orthotics and  
2 conservative treatment of pain. The effectiveness of treatment is a relevant factor  
3 in determining the severity of a claimant's symptoms. 20 C.F.R. § 404.1529(c)(3);  
4 *see Warre*, 439 F.3d at 1006 (conditions effectively controlled with medication are  
5 not disabling for purposes of determining eligibility for benefits) (internal citations  
6 omitted); *see also Tommasetti*, 533 F.3d at 1040 (a favorable response to treatment  
7 can undermine a claimant's complaints of debilitating pain or other severe  
8 limitations). Evidence of "conservative treatment" is sufficient to discount a  
9 claimant's testimony regarding the severity of an impairment. *Parra v. Astrue*, 481  
10 F.3d 742 (9th Cir. 2007) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.  
11 1995) (treating ailments with an over-the-counter pain medication is evidence of  
12 conservative treatment sufficient to discount a claimant's testimony regarding the  
13 severity of an impairment)). The ALJ noted that Plaintiff had affirmed in his  
14 testimony that his foot impairment was managed solely with orthotics, and without  
15 pain medication. Tr. 785. In 2012, Dr. Cardon advised Plaintiff to use ice, anti-  
16 inflammatory medication, and rest to relieve his reported intermittent foot pain.  
17 Tr. 785 (citing Tr. 765 (Oct. 16, 2012 chart note). After supports were added to  
18 Plaintiff's orthotics, his primary medical care treatment records did not refer to any  
19 foot complaints. Tr. 785. Plaintiff later visited Dr. Cardon in August 2015 and  
20 April 2016 to discuss getting a new pair of shoes or stretching his shoes in order to

1 improve ambulation. Tr. 785 (citing Tr. 1085-93). This was a clear and  
2 convincing reason to discredit Plaintiff's symptom claims.

3 Third, the ALJ cited the lack of examination findings of significant  
4 impairment as incompatible with Plaintiff's allegation of disabling foot pain. An  
5 ALJ may not discredit a claimant's symptom testimony and deny benefits solely  
6 because the degree of the symptoms alleged is not supported by objective medical  
7 evidence. *Rollins*, 261 F.3d at 857; *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th  
8 Cir. 1991); *Fair*, 885 F.2d at 601. However, the medical evidence is a relevant  
9 factor in determining the severity of a claimant's pain and its disabling effects.  
10 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). Minimal  
11 objective evidence is a factor which may be relied upon to discount a claimant's  
12 testimony, although it may not be the only factor. *Burch*, 400 F.3d at 680. Here,  
13 the ALJ noted the medical evidence did not reflect Plaintiff had any significant  
14 impairment in his gait or ambulation, edema, or need to elevate his legs. Tr. 785.  
15 Furthermore, there was no reference to foot complaints in his primary medical care  
16 in 2011, 2013, and 2014, as well as unremarkable findings in his visit with Dr.  
17 Cardon in 2014 and 2015 and in his physical evaluation conducted in in 2015. *Id.*;  
18 see Tr. 1094 (Dec. 2014 visit with Dr. Cardon grading Plaintiff's pain as "mild"  
19 and "staying the same"); Tr. 1096 (Jan. 2015 visit with Dr. Cardon indicating no  
20 edema and "mild" pain); Tr. 1140 (Mar. 2015 physical examination). The lack of

1 medical evidence supporting the reported disabling symptoms was a clear and  
2 convincing reason to discount Plaintiff's symptom claims.

3 Fourth, the ALJ found Plaintiff's activities were inconsistent with the  
4 alleged severity of both his mental and physical impairments. Tr. 785. It is  
5 reasonable for an ALJ to consider a claimant's activities that undermine reported  
6 symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a substantial part of  
7 her day engaged in pursuits involving the performance of exertional or non-  
8 exertional functions, the ALJ may find these activities inconsistent with the  
9 reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*, 674 F.3d at 1113.  
10 "While a claimant need not vegetate in a dark room in order to be eligible for  
11 benefits, the ALJ may discount a claimant's symptom claims when the claimant  
12 reports participation in everyday activities indicating capacities that are  
13 transferable to a work setting" or when activities "contradict claims of a totally  
14 debilitating impairment." *Molina*, 674 F.3d at 1112-13. The ALJ identified  
15 evidence in the record where Plaintiff had reported caring for pets, occasionally  
16 doing household chores, walking up to 30 to 45 minutes for exercise, mowing the  
17 lawn, and fishing. Tr. 786; *see* Tr. 1213 (discussing wearing orthotics for a  
18 "couple of miles"); Tr. 809 (testimony Plaintiff walked in the evening for 30-45  
19 minutes); Tr. 259 (listing mowing as an activity Plaintiff can do); Tr. 749 (Feb.  
20 2011 progress note listing main hobbies as computer games and fishing). This was

1 a clear and convincing reason supported by substantial evidence to discount  
2 Plaintiff's symptom claims.

3 Finally, the ALJ found that the record as a whole suggested Plaintiff's lack  
4 of employment was due to a lack of motivation, independent of his impairments.  
5 Tr. 786. Evidence of self-limitation and lack of motivation to work are proper  
6 considerations in assessing a Plaintiff's symptom claims. *Tommasetti*, 533 F.3d at  
7 1040 (9th Cir. 2017). The Court notes that this reason was also previously  
8 reviewed and affirmed in this Court's February 17, 2016 decision. Tr. 891-92.  
9 The ALJ noted that additional evidence obtained after this Court's decision  
10 continued to suggest Plaintiff's lack of motivation. For example, in July 2015,  
11 Plaintiff told his counselor that he was "about the same, bored" and that he had not  
12 put effort into engaging in a job search. Tr. 786-87 (citing 1126). In October  
13 2016, Plaintiff agreed with his counselor's comment that he had not put effort into  
14 looking for work or changing his situation, at which point, his counselor suggested  
15 that Plaintiff discontinue therapy because "he has essentially met his treatment  
16 goals." Tr. 787 (citing Tr. 1745). The ALJ properly considered Plaintiff's lack of  
17 motivation to work in rejecting Plaintiff's symptom claims.

18 The sole arguments raised by Plaintiff, ECF No. 15 at 20, were addressed by  
19 the court, *supra*, in upholding the ALJ's evaluation of Dr. Cardon's opinions.

1 Accordingly, the Court concludes the ALJ offered specific, clear and  
2 convincing reasons for partially rejecting Plaintiff's symptom claims regarding the  
3 severity of his foot impairment.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's findings, this court concludes the  
6 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
7 Accordingly, **IT IS HEREBY ORDERED:**

- 8 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **DENIED**.  
9 2. Defendant's Motion for Summary Judgment, ECF No. 16, is **GRANTED**.  
10 3. The Court enter **JUDGMENT** in favor of Defendant.

11 The District Court Executive is directed to file this Order, provide copies to  
12 counsel, and **CLOSE THE FILE**.

13 DATED January 10, 2019.

14 s/Mary K. Dimke  
15 MARY K. DIMKE  
16 UNITED STATES MAGISTRATE JUDGE  
17  
18  
19  
20